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CURRENT TOPICS.

A curious case was recently decided by the Texas Supreme Court, entitled McCue v. Klein, which sets a limit to the application of the maxim, *volenti non fit injuria*. It was an action by the widow for damages for causing the death of her husband by wrongful act. The wrongful act complained of, was that the defendants knowing that plaintiff's husband was an habitual drunkard, who, from long and excessive use of intoxicating liquors, had so beclouded his mind and fettered his will that he was wholly incapable of resisting his appetite for strong drink when offered to him in any quantity whatever, wilfully and recklessly conspired together to induce and cause him to swallow three pints of whisky in quick succession, and did actually induce him so to do and thereby caused his death; that the defendants made a wager that the deceased could drink that quantity of whisky at one time, and gave him a dollar to undergo the experiment. After he had taken two pints quickly following one after the other, and was in a state of intoxication by means of which he had lost all self control, and when the appellants were proceeding to administer to him the third pint, a bystander remonstrated with them, declaring that if he drank this third pint it would certainly cause his death. They did not, however, heed the warning, but prevailed on the deceased to swallow the third pint, whereupon he immediately died. A demurrer to this cause of action was sustained in the court below. This decision was overruled by the Supreme Court, saying: "As a general principle, a man can recover no damages for an injury received at the hands of another with his own consent, unless it arises from an act which is in itself a breach of the peace. For instance, it is said by Mr. Cooley, that 'a man can not complain of a nuisance, the creation of which he concurred in or countenanced.' But, if two men agree to fight, and one is injured, the law will not excuse on account of the consent given to the assault. And 'an injury, even in sport, would be an assault if it went beyond what was admissible in sports of the sort, and was intentional.' Cooley on Torts, 163; Adams v. Waggoner, 33 Ind. 531; Commonwealth v. Coleberg, 119 Mass. 350. Much less can a man consent to the taking of his own life, or to an injury which is likely to result in his own death. But even in cases where no breach of the peace is involved, and the act to which consent is given is matter of indifference to public order, the maxim of *volenti non fit injuria* presupposes that the party is capable of giving assent to his own injury. If he is divested of the power of refusal by reason of total or partial want of mental faculties, the damage can not be excused on the ground of consent given. A consent given by a person in such condition is equivalent to no consent at all, more especially when his state of mind is well known to the party doing him the injury. If an infant of tender years, or an idiot, or a person *non compos mentis* from any cause, agrees to an act which he can not know will injure him, the person causing him to perform, or suffer the performance of such an act, will be answerable for its consequences. It is just as if a person, without knowledge that a poisonous or deleterious substance is contained in an article of food offered him, swallows it at the solicitation of another, who is aware of its noxious character; in such a case, of course, the one who gives the food is liable in damages for the injury that follows. Commonwealth v. Stratton, 114 Mass. 303. And so, if one whose mental faculties are suspended by intoxication, is induced to swallow spirituous liquors to such excess as to endanger his life, the persons taking advantage of his condition of helplessness and mental darkness, and imposing the draught upon him, must answer in damages for the injury that ensues. They must answer to him if such injury should fall short of destruction of life, and to his family if death should be the result. Admitting that the allegations show that deceased had, at the time he consented to drink such an excessive quantity of spirits, sufficient consciousness to know the injury it was likely to cause him, still the act of the defendants can not be excused because he consented to an experiment which might end in his death. The rule of law is clear that consent to an assault is no justification. Christophan v. Bare, 11 Q. B. 477; Cooley on Torts, 163.

MERGER IN ENFORCEMENT OF THE LIEN OF MORTGAGE AND ATTACHMENT.

The effect of a foreclosure or enforcement of a lien by judgment, as far as the question of merger is understood, is very seldom investigated by the courts. Take the case of a mortgage lien where it conflicts with a judgment lien. A holds a mortgage on real estate, given by B, who owns the land. The mortgage is a lien on the land for twenty years after the debt it secures becomes due. C holds a judgment against B, rendered eighteen years after the mortgage debt falls due, and which is also a lien on the mortgaged land. A foreclosed his mortgage eighteen years after the debt secured fell due, obtaining a personal judgment against B for the amount secured, in addition to the judgment of foreclosure, which personal judgment is also a lien on the land mortgaged. The lien of C's judgment continues ten years from the date of its rendition, and so does the lien of A's personal judgment. A's judgment is rendered one day after C's. A causes an execution to issue on his judgment three years after its rendition, and the land is sold to D. Afterward C causes an execution to issue on his judgment, four years after its rendition, and the land is sold to E. What are the respective rights of D and E? It is obvious at a glance that the problem turns upon the question of merger,—the merger of the lien of the mortgage in the judgment of foreclosure. If the lien of the mortgage was merged in the judgment of foreclosure, then did the lien of the personal judgment become tacked to that of the mortgage, and thus make one continuous lien for twenty-eight or thirty years? or did the lien of the mortgage cease at the end of the twenty years after the mortgage debt became due, and thus permit C's judgment to take precedence of A's judgment of foreclosure? It must be borne in mind that no priority of levy of an execution, issued on either judgment, is here considered; for when two judgments are liens on real estate, neither lien can be affected by a levy of an execution issued upon either judgment.

Before proceeding to a discussion of the question, it must be observed that obtaining a judgment upon the mortgage debt is no bar to a foreclosure proceeding afterwards instituted on the mortgage securing the debt.[1] This is true even where the judgment is not for the whole debt secured by the mortgage,[2] or the instrument securing it is an ordinary mortgage or trust deed.[3] But in such a case, the cause of action—the original indebtedness—is merged, and no action can be maintained thereon if the defendant objects. In the early English cases the rule rests upon the sole ground that an inferior remedy has been changed to a higher.[4] In the later cases, in addition to the rule already stated, it is said that there should be an end of all further litigation, and the allowance of a new suit is superfluous and vexatious.[5] While the courts have in a measure departed from the original reason given for the rule, it may be stated as an axiom in our practice, that two suits can not be maintained on the same cause of action between the same parties.[6] In such a case, it is usually said that the cause of action "is drowned in the judgment;"[7] and there is no doubt that it has lost its vitality, has expended its force, and "all its power to sustain rights and enforce liabilities, has terminated in the judgment or decree.[8] In one case it is said: "If a demand of an inferior degree is changed to a higher character, the former is merged in the latter, upon which the party must alone rely. Thus is a

[1] Torrey v. Cook, 116 Mass. 163; Butler v. Miller, 1 N. Y. 496; Lewis v. Conover, 21 N. J. Eq. 230; Flanagan v. Westcott, 3 Stock. (N. J.) 264; Cissna v. Haiger, 18 Ind. 496; Jenkinson v. Ewing, 17 Ind. 505; O'Leary v. Snediker, 16 Ind. 404; Hensiker v. Lamborn, 13 Ind. 468; Markle v. Rapp, 2 Bikf. 268; Thornton v. Prigg, 24 Mo. 249; Riley v. McCord, 21 Mo. 285; Jordan v. Smith, 30 Iowa. 300; Hendershot v. Ping, 24 Iowa, 134; Shearer v. Mills, 35 Iowa, 499; Wahl v. Phillips, 12 Iowa, 82; State v. Lake, 17 Iowa, 215; Morrison v. Morrison, 38 Iowa, 73; Wayman v. Cochrane, 35 Ill. 152; Vansant v. Allman, 23 Ill. 30; Hamilton v. Quimby, 46 Ill. 90; Hewitt v. Templeton, 48 Ill. 367; Darst v. Bates, 54 Ill. 439; Priest v. Wheelock, 58 Ill. 114; Ely v. Ely, 6 Gray, 439; Touse v. McCreary, 2 Blackf. (Ind.) 246; Stevens v. Dufour, 1 Blackf. (Ind.) 387; Tooke v. Hartley, Brown L. C. 126.

[2] Applegate v. Mason, 13 Ind. 75; Holmes v. Hinkle, 63 Ind. 518.

[3] Hamilton v. Quimby, 46 Ill. 90; Brumagim v. Chew, 19 N. J. Eq. 130; Davis v. Battine, 2 R. & My. 76.

[4] Viner's Abr., citing 6 Rep. 44b, and 45 a. b.

[5] Smith v. Nicholl, 7 Dowling, 282; s. c., 5 Bing. (N. C.) 208.

[6] See Pitti v. Fugate, 41 Mo. 405; Andrews v. Varrell, 46 N. H. 17; King v. Hoare, 13 M. & W. 494.

[7] Biddleson v. Whitel, 1 W. Ble. 507.

[8] Freeman on Judgments, citing Wayman v. Cochrane, 35 Ill. 152; Hogg v. Charlton, 25 Pa. St. 200.

simple contract debt merged in a judgment or debt of record. In that case, a cause of action no longer subsists upon the original demand. The party has a higher security in the judgment. So, if a bond is given for a simple contract debt, the latter is lost in the former, the specialty being of a higher security.[9] But the doctrine of merger does not always depend upon the ground that the instrument in which the contract or former instrument is merged is of a higher nature. Thus, if a judgment is rendered by a justice of the peace in a suit on a judgment rendered in a district or circuit court of the United States, it is quite obvious that the last judgment is not of as high a character as the former one; but no action can a second time be maintained upon the first judgment, if the defendant objects.[10] Thus where a judgment was recovered in a court of competent jurisdiction in Indiana, and another judgment was recovered in Ohio upon the one recovered in Indiana, it was held that the Indiana judgment was merged in the Ohio judgment, and all the liens and priorities upon lands in Indiana were abandoned, and the owner of such lands could enjoin a sale of the same on execution issued thereon.[11]

As an illustration of the doctrine of merger, the case of Wayman v. Cochrane[12] is an apt one. A bond had been given which bore ten per cent. interest, and which was secured by a mortgage. Judgment was obtained upon the bond, and the judgment only drew six per cent. interest. The judgment not having been paid, a judgment of foreclosure of the mortgage was taken, with six per cent. interest from the date of the bond. On appeal, the judgment of foreclosure, as to the amount of interest allowed, was held to be erroneous, the court saying: "The general rule is, that by a judgment at law or a decree in chancery, the contract or instrument upon which the proceeding is based, becomes entirely merged in the judgment. By the judgment of the court, it loses all its vitality and ceases to bind the parties to its execution. Its force and effect are then expended, and all remaining liability is transferred to the judgment or decree. Once becoming merged in the judgment, no further action at law or suit in equity can be maintained on the instrument. All rights and liabilities originally imposed by, or growing out of, the instrument or agreement, terminate with the judgment of the court. This being so, when the judgment was rendered on the bond in this case, it ceased to be evidence of the debt, and the judgment then became the evidence, and the only evidence that could be used in a court of the existence of the original debt. And that debt could bear only six per cent. interest, whether evidenced by a judgment or a decree. Then, if the judgment were the evidence, the decree should have been for the amount of the judgment with six per cent. interest thereon from the date of its rendition to the time the decree was rendered."[13] Where a levy is made and a delivery bond is taken and forfeited, this forfeiture, by statute, has the force of a judgment, the levy is discharged and the bond so forfeited held to be a satisfaction of the former judgment.[14]

It will be observed that the cases referred to are upon the question of merger of the debt secured by the mortgage; but some of them also decide the question, whether the lien of the mortgage is merged in the judgment by the foreclosure proceedings. Riley v. McCord,[15] is one of these cases. An action for a *scire facias* was brought upon a mortgage to enforce its collection. and the

[9] Mann v. McNulty, 2 Gilm. (Ill.) 355.

[10] Gould v. Hayden, 63 Ind. 443; Freeman on Judgments, 215.

[11] Gould v. Hayden, *supra*.

[12] 35 Ill. 152.

[13] See Cissna v. Horner, 18 Ind. 496. In Runnamaker v.——, 54 Ill. 303, it was held that a verbal promise to pay an existing judgment was not binding, because it was without any consideration, and that it did not extinguish the force of the judgment.

[14] Cooke v. Piler, 2 Munf. 153; Lusk v. Ramsay, 3 Id. 433; United States v. Grever, 2 Brock. 385; Joyce v. Farquhar, 1 A. R. Mor. 20; Justices v. Lee, 1 B. Mon. 248; Davis v. Dickson, 1 How. (Miss.) 68; Sanders v. M'Dowell, 4 Id. 9; Minor v. Lancanshire, 4 Id. 350; Wanzer v. Baker, 4 Id. 369; Bank of United States v. Patton, 5 Id. 200; Barker v. Planter's Bank, 5 Id. 566; Amis v. Smith, 16 Pet. 304; Wright v. Yell, 13 Ark. 503; Lipscomb v. Grace, 26 Ark. 234; Pursell v. Shute, 25 Ark. 469; Black v. Nettle, 25 Ark. 606; Commonwealth v. Merrigan, 8 Bush. 132. *Contra*, Patton v. Hamner, 33 Ala. 307; Hopkins v. Land, 4 Ala. 427; Randolph v. Randolph, 3 Rand. 490. That one judgment does not merge another, see Weeks v. Pearson, 5 N. H. 324; Preston v. Preston, Cro. Eliz. 817; Mumford v. Stocker, 1 Cow. 178; Griswold v. Hill, 2 Paine C. C. 492; Andrews v. Smith, 9 Wend. 53; Phelps v. Johnson, 8 Johns. 54; Jackson v. Shaffer, 11 Johns. 517; Howard v. Sheldon, 11 Paige, 562; Bates v. Lyons, 7 Paige, 85; Gregory v. Thomas, 20 Wend. 20; Baker v. Martin, 3 Barb. 641.

[15] 21 Mo., 285.

court said: "The question in this case is, whether the lien of a mortgage is merged in a judgment obtained in a proceeding under the statute to foreclose the mortgage? If the lien of mortgage is extinguished by the judgment, the mortgagee is in a dangerous situation, such a one that would induce many mortgagees to forego the remedy provided by the statute; for the mortgage lien being extinguished by the lien of the judgment obtained in the suit for a foreclosure, and the lien of the judgment taking effect from its rendition, if judgment should have been previously rendered against the mortgagor in favor of others, though subsequent in date to the mortgage, those subsequent creditors would obtain a preference over a prior mortgage, though duly recorded. So proceedings for a foreclosure under the statute may be begun where any part of the mortgaged premises are situated. Mortgaged lands may be in several counties. The lien of a judgment may be in several counties. The lien of a judgment is only operative in the county in which it is rendered, so that in such cases the mortgage lien will be destroyed. It is the just expectation of the creditor that when he takes a mortgage he has a security which lasts until the mortgage debt is paid. This is a reasonable expectation, and it should not be defeated, unless the law plainly requires it. The statute concerning mortgages was designed within itself to afford the mortgagee means of enforcing the payment of his debt. There is no reason why the mortgagee, in resorting to the statutory remedy, should have his security, if not entirely, extinguished, at least very much impaired. We should be loth to adopt such construction, were there nothing but the general laws concerning judgments and administrations. * * The judgment itself, although by our statute it ceases to be a lien after three years, is not presumed to be satisfied until after the expiration of twenty years from its rendition. Because a judgment lien is rendered to foreclose a mortgage, why should the mortgagee be deprived of the security of the mortgage after three years, when the law only presumes the mortgage lien to be discharged after twenty years? The judgment on the proceedings for a foreclosure would have shown that it was founded on a recorded mortgage. It would appear that the judgment itself was unsatisfied. How, then, could any one have sustained any injury by reason of the want of notice? Another view may be taken of this subject. A mortgage creates a lien. It is not a mere lien. It is something more. It is an estate in the land, condi'ioned, it is true; but the condition is that it shall endure until the debt is satisfied. Why should a judgment unsatisfied destroy the estate against the express stipulation of the petition."[16]

Another court said: "The judgment obtained in this *scire facias* sued out upon the mortgage here created no lien whatever upon the land. The lien was created by the mortgage itself; the judgment neither added to nor took anything from it. It is clear, therefore, that the acts of assembly, which require judgments creating liens, or binding lands, or real estate, to be revived every period of five years, for the purpose of continuing such liens, do not extend to or embrace the liens of mortgages, and can have no application to or bearing upon them whatever. The lien of the mortgage, therefore, continued to exist in the present case as if no *scire facias* had been sued out and judgment obtained upon it. The only effect of a judgment in such a case is to give the mortgagee an execution immediately, if he chooses, against the land mortgaged, and nothing else, that he may levy the amount of his debt out of it by a sale thereof. The *scire facias* will also, if sued out within twenty years after the mortgage money shall have become payable, prevent the presumption of payment from arising, which, without it, would arise, unless repelled by other circumstances.[17]

These cases held that an enforcement of the mortgage by process can in no way affect the lien; that the lien continues the same as it did previous to the legal proceedings. One was an ordinary foreclosure, the other was a proceeding of *scire facias*, extending by statute to the foreclosure of mortgages in Pennsylvania, Illinois and Colorado.[18]

In Iowa, the lien of a mortgage continues twenty years after the debt secured is due, and the lien of a judgment continues ten years. With reference to this subject the

[16] Riley v. McCord, 21 Mo. 285.
[17] Helmbold v. Man, 4 Whart. (Pa.) 410, 422.
[18] 2 Jones on Mort., secs. 1325, 1333, 1355; 4 Bouv. Inst., sec. 3716.

court said: "But the lien acquired by the mortgage was the result of the contract of the parties. The lien of the mortgage was independent and prior to the judgment. It in no manner depended upon the judgment for its existence; the judgment did not merge the lien of the mortgage, but was simply a means of effectuating and enforcing the lien. The judgment did merge the mortgage-debt, but a merger of the debt, or any change of the evidence of it, or by giving a note for the amount secured by mortgage, by renewal of the note, giving a bond or other thing short of payment, does not destroy the lien of the mortgage, that continues until the debt is paid or discharged.[19] In Rockwell v. Servant,[20] it was said: "Did the mere recovery of the judgment on the *scire facias* extinguish the relation of mortgagor and mortgagee? We think not. Whilst it may have made some changes in their prospective rights, it must be conceded that the most essential and important continued. The money was still due the mortgagee, and he still retained unimpaired his lien on the premises, not only subject, but ordered to be sold for its payment. Neither the note nor mortgage was satisfied or discharged, but both remained in full force."[21]

In the Evansville Gaslight Co. v. State,[22] the subject received a careful examination. The facts in the case were as follows: May 12, 1862, the State foreclosed a mortgage against one Jones, given on the two lots, twenty-three and twenty-nine, in dispute. April 15, 1872, Jones died. A month after its rendition an execution was issued on the judgment of foreclosure, and returned in a few days unsatisfied. The decree of foreclosure was rendered upon two several mortgages, one dated April 14, 1855, given upon lot twenty-three, and the other dated August 5, 1859, given upon lot twenty-nine. On the 7th day of December, 1871, Jones and his wife conveyed lot twenty-three to Reitz, the defendant (not the auditor), and on the 3d day of November, 1865, he and his wife conveyed lot twenty-nine to the Gaslight Company. The State, by the county auditor, prosecuted the suit against the Gaslight Company and Reitz to revive the decree of foreclosure which had been taken against Jones and his wife, and obtained a judgment against the company, and got an execution against lot twenty-nine. The court held that the mortgage on lot twenty-three, owned by Reitz, having been executed more than twenty years the decree as to lot twenty-three was barred and could not be enforced. The Gaslight Company appealed from this judgment. It thus appeared that the mortgage on lot twenty-nine was given April 14, 1859; was foreclosed May 12, 1862, and the action to revive the decree was commenced November 10, 1877. By statute, judgments in Indiana are liens upon real estate lying within the county where they are rendered for ten years after their rendition, and mortgages are liens for twenty years after their execution. The appellate court held the judgment as to the gaslight company was correct; that the lien of the mortgage extended through the period the judgment of foreclosure was a lien upon it, and did not cease, at least, until the end of twenty years after the mortgage debt fell due. Reitz did not appeal, so that his case was not before the appellate court. But it may be observed that the mortgage on the lot he purchased was given April 14, 1855; it was foreclosed May 12, 1862, and never satisfied. The mortgage was in favor of the county. It foreclosed it, and it sought to revive it. The *nisi prius* court held that twenty years having expired since the mortgage was given, the lien had expired and could not be revived. The appellate court said: "Nor is it clear that where a mortgage is foreclosed the decree 'swallows' the lien of the mortgage. There are at least two very strong reasons

[19] Hendershott v. Ping, 24 Iowa, 134. The foreclosure of the mortgage referred to was the ordinary foreclosure in equity. The same doctrine has been affirmed in other cases. Shearer v. Mills, 35 Iowa, 499; Morrison v. Morrison, 38 Iowa, 73. See also State v. Lake, 17 Iowa, 215, 219; Jordan v. Smith, 30 Iowa, 500. A note and mortgage which have become barred by the statute of limitations may be revived by an admission of indebtedness by the mortgagors, and the priority of the mortgage lien be thereby preserved as against subsequent liens, taken before the mortgage became barred, and not foreclosed until after it is revived; but one acquiring an interest in mortgaged property after foreclosure of the mortgage is barred by the statute, and before a new promise is made, holds a superior right to the mortgagee after his debt is revived by a new promise. Kerndt v. Porterfield, 56 Iowa, 412. See Day v. Baldwin, 34 Iowa, 380.

[20] 63 Ill. 424.

[21] That the relations of the parties are changed, see Hartman v. Ogborn, 54 Pa. St. 120, where it was held that a judgment on a void mortgage was binding, and could not be disputed.

[22] 75 Ind., 219; S. C., 20 Am. L. Reg. 676; 38 Am. Rep. 129.

why this can not on principle be so: First, the mortgage lien is a specific one, the judgment a general one, and the lien of the former is, therefore, the superior one. * * * Second, the lien of the mortgage is superior in duration to that of the judgment. In these two essential particulars the mortgage lien is the greater, and it would seem almost a contradiction in terms to declare that the inferior lien can swallow the greater. The whole theory of merger is that the greater estate or thing takes into itself the less, and this can not be so where there are essential particulars in which the one alleged to be the inferior is really the superior. It can hardly be possible that even an imaginary legal entity can be conceived as capable of absorbing into itself another thing greatly larger in two very essential and prominent features. The merger of a judgment takes up the mortgage as a cause of action, but not as a lien. There is a broad distinction between a merger of a cause of action and the merger of a lien. It is owing to error in confusing the merger of the cause of action with the merger of a lien, that some of the courts have been led into the erroneous holding that a judgment extinguishes the mortgage lien. A suit of foreclosure is a remedy for the enforcement of a mortgage lien, and it ought not to be abridged by holding that the decree cuts down, rather than enlarges, the lien. Without a decree the lien continues for twenty years, and surely that which is meant to carry into effect this lien ought not to be allowed to have the effect of shortening the duration of the lien to a period one-half shorter than that for which it would continue without the decree. Upon principle it is, in our opinion, very clear, that although the judgment merges the mortgage as a cause of action, it does not abridge or extinguish its lien." [23]

But there are authorities that differ from those just cited and quoted from. Thus, in Lewis v. Conover,[24] it is said that the mortgage is merged in the judgment of foreclosure, which can only be construed to mean both the debt and mortgage lien. In New York it was said: "This mortgage was merged in the decree entered upon it, which decree was enrolled, but not docketed. The lien of the mortgage was thus extinguished and gone. That a judgment of law extinguishes the debt upon which it is obtained is too plain a proposition to require argument or authority to prove. I am not able to see why a decree of a court of equity should not have the same effect. * * * * The decree was not a lien because it was not docketed." [25] This was only a *dictum*, but it was cited in a subsequent case,[26] although the court in the last case speak only of the debt being merged; and so another case refers to it in the same manner.[27] In another and later case it is said the mortgage is merged in the judgment, citing People v. Beebe.[28]

Referring now to the question propounded at the beginning of this article, it is of easy solution. If the mortgage lien and judgment lien held by A become blended by the foreclosure so as to make them one continuous lien, then D, the purchaser under his judgment, has the superior right, and can oust E; but if they did not blend, and the mortgage lien was not extended by the judgment lien, a very different result is arrived at, for E has the better claim, the judgment under which he claims having been rendered one day earlier than A's, and therefore being the superior lien. Upon reason it seems that they can not be held to blend, for they are distinct and separate liens, belonging to two distinct classes of liens; one is a general lien, and the other a particular lien, and courts are loath to tack such liens together. By law, A had twenty full years in which to foreclose his mortgage and complete his claim to the land; having failed so long a time to enforce his rights, he can not ask a court of equity, with any degree of success, to tack the liens together so as to make amends for his laches. In Evansville Gaslight Co. v. State, *ex rel.* Reitz, the *nisi prius* court held that the lien of the judgment of foreclosure having expired

[23] Lapping v. Duffy, 49 Ind. 51, holds that the mortgage is not so merged in the judgment that the holder of a subsequent incumbrance obtains a priority of lien. The reporter has added in the *syllabus* to this case: "But the judgment of foreclosure is a continuation of the mortgage lien." This is not warranted by the opinion. See also Teal v. Hinchman, 69 Ind. 379, where it is held that a mortgage is not so merged in the judgment of foreclosure as to defeat the mortgage lien. To the same effect as the Indiana case is Priest v. Wheelock, 58 Ill. 114.

[24] 21 N. J. Eq., 230.

[25] People v. Beebe, 1 Barb. 379.

[26] Gage v. Brewster, 31 N. Y. 226.

[27] Ellsworth v. Muldoon, 15 Abb. Pr. (N. S.) 445.

[28] Rawlsyer v. Hamilton, 51 How. Pr. 299. See Smith v. Gardner, 42 Barb. 356.

before the mortgage lien did, and the latter having also expired, it could not be revived. If the lien of the mortgage expires at the end of twenty years, although it has been foreclosed, and the lien of such judgment of foreclosure has expired previous to that date, it is difficult to see why the lien of such mortgage would not expire in the same period of time, even though the judgment was then in force; for the reasoning in either case is the same. Had A procured an execution to issue on his judgment and caused the land to be sold before the end of the twenty years, D would have procured a good title, one superior to E; for then the judgment and execution would only have put the mortgage lien into execution, and the rights of the parties would have related back to the day of the sale. This would also be true, even though the sale occurred the day before the mortgage lien expired, and there was a year allowed, after the sale, for redemption.

The case of the Evansville Gaslight Co. v. State *ex rel.* Reitz, has met with considerable adverse criticism at the hands of several writers.[29] It is not the purpose of the writer to indulge in any controversy over the subject, any more than to call the attention of the profession to the fact that but very few courts have accepted the theory of the writers alluded to; but, on the contrary, the principle announced in that case is accepted by far the greater number of courts as the true one, and especially those courts that have given it a very careful consideration.

The enforcement of attachment liens is attended with more difficulty. In Martin v. Dryden,[30] the court said, after discussing the subject at some length: "We are of opinion that the attachment is a lien from the date of the levy, when followed by a judgment, and which will have relation back to it." In Lynch v. Crary,[31] it was said: "The attachment is not discharged by the entry of judgment against the defendant, but is operative thereafter to hold the lien acquired thereby until execution issues. * * * * The remedy for the enforcement of the lien of the judgment is by execution, and by proceedings based upon it, and the attachment continues in force after judgment only for the purpose of giving effect to the lien acquired under it, and existing when the judgment was rendered." In Thompson v. Culver,[32] it is said that the judgment does not supersede the attachment; in Schieb v. Baldwin,[33] that the judgment does supersede the attachment, which becomes of no force; in Syracuse City Bank v. Coville,[34] that the judgment confirms the lien of the attachment; in Spencer v. Rogers Locomotive Works,[35] that by the recovery of the judgment the lien of the attachment was consummated, and the right to satisfaction out of the specific property established; and in Bowen v. First National Bank,[36] that for many purposes the attachment continues to be operative after the judgment has been recovered and the execution has been issued. In Schieb v. Baldwin,[37] the court say; "I can not entertain a doubt that the attachment is spent, and becomes powerless the instant the judgment is entered." In Iowa it was said by the court: "It is true such lien can be made available only upon condition that he recover a judgment in the suit, and proceed according to the requirements of the law to subject the property to sale under execution. But when this is done and a question arises as to the title of property claimed through the attachment, and the judgment and execution following it, the rights so acquired look back for their inception not to date of the judgment, but to the attachment." [38]

The Supreme Court of California, in discussing this question, said: "The purpose of an attachment is to hold the property of the defendant as security for such judgment as may be rendered, and when the judgment is rendered and becomes a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment.

If it does not cease at that time, except as

[29] 24 *Albany Law Journal*, 439, 480; Mr. Austin Abbott in New York *Daily Register*, 1881. See note in 38 Am. Rep., 133.
[30] 1 Gilm. (Ill.) 187, 213.
[31] 52 N. Y., 181.
[32] 24 How. Pr., 286; s. c., 15 Abb. Pr. 97.
[33] 22 How. Pr., 278; s. c., 13 Abb. Pr. 469.
[34] 19 How. Pr., 385.
[35] 13 Abb. Pr., 180.
[36] 34 How. Pr., 408.
[37] *Supra.*
[38] Hannaker v. Felt, 13 Iowa, 141, 143.

giving priority to the judgment lien, when does it cease? Does it continue after the judgment lien has expired by limitation? The attachment lien, as to its amount, depends upon the *ex parte* statement of the plaintiff, while that of the judgment is certain. The lien of the latter is of a higher order, if it is possible that there can be different ranks among liens. We will hazard the assertion that the law does not contemplate the existence, at the same time, of two distinct liens, arising by operation of law in one action, for the security of one demand. If the position is correct that the attachment lien closes, except as maintaining a priority for the judgment lien upon the property attached, it does not revive on the expiration of the judgment lien." [39]

These cases are inconsistent with each other to such an extent as to be irreconcilable. To the writer it seems that the correct theory is that the judgment in attachment confirms the attachment lien, holds the property for the satisfaction of the judgment, and when such property is sold, or the judgment satisfied, as it ceases as a means of enforcing the debt, the lien falls to the ground.

W. W. THORNTON.

Crawfordsville, Ind.

[39] Bagley v. Ward, 37 Cal. 121, 131.

INSANITY AS A DEFENSE IN CRIMINAL CASES.

Three distinct doctrines have been presented by the courts as to the amount of evidence necessary for an acquittal in cases where insanity is relied upon by the defense. First: It has been held that inasmuch as the presumption of innocence attends the defendant on trial, and the presumption of sanity likewise attends the case of the State, the same amount of evidence is requisite to remove one presumption as the other. And since the State must establish the guilt of the defendant beyond a reasonable doubt, so the defendant, when he pleads insanity for his defense, must establish his insanity beyond a reasonable doubt.[1] Second: It has been held that insanity is a simple question of fact, to be proven like any other fact; and any evidence which reasonably satisfies the jury that the accused was insane at the time the act was committed should be deemed sufficient for an acquittal.[2] Third: It has been held that where a person is accused of the commission of a crime and pleads that he was insane at the time, evidence of sufficient weight to raise in the minds of the jury a reasonable doubt of defendant's sanity at the time the act was committed, entitles him to an acquittal.[3] One and only one of these positions can be logically consistent with the general principles of law regulating trials for crime. It is a question of pure logic where the decision of the court determines the law. And yet learned and distinguished jurists have been lead by their reasoning upon the same subject-matter to three widely different and incompatible conclusions. The divergence of great minds, equally powerful and acute in their rationalism, can only be accounted for by supposing that some of them have ignored certain fundamental principles without which all investigation, however elaborate, must end in error. "Given false premises and nothing but bad logic can save you from a false conclusion."

The first doctrine, as will appear from the references, has received but scanty support in the adjudications by superior courts in this country. Indeed the reasoning upon which it is founded is so monstrously absurd as hardly to rise to the dignity of sophistry even, and hence the present discussion will be confined to the theories propounded in the second and third declarations of law mentioned above.

[1] Clark v. State, 12 Ohio, 495; Bonfante v. State, 2 Minn. 123; State v. Pratt, 1 Houst. Crim. C. (Del. 249.

[2] State v. Lawrence, 57 Me. 574; Commonwealth v. Rogers, 7 Met. (Mass.) 500; Bond v. State, 23 Ohio St. 349; State v. Strauder, 11 W. Va. 747; Baccigalupo v. Commonwealth, 33 Gratt. (Va.) 807; State v. Vann, 82 N. C. 631; State v. Coleman, 27 La. Ann. 691; State v. Redemeier, 71 Mo. 173, and cases cited; People v. M'Donnell, 47 Cal. 134; State v. Strickley, 41 Iowa, 222; McKenzie v. State, 26 Ark. 334; Pannell v. Commonwealth, 86 Pa. St. 260; O'Connell v. People, 87 N. Y. 376; s. c., 41 Am. Rep. 379; Kriel v. Commonwealth, 5 Bush. (Ky.) 362; Boswell v. State, 63 Ala. 307; s. c., 35 Am. Rep. 20; Webb v. State, 9 Tex. App. 490.

[3] State v. Bartlett, 43 N. H. 224; Underwood v. People, 32 Mich. 1; Chase v. People, 40 Ill. 352; Ogletree v. State, 28 Ala. 701; State v. Crawford, 11 Kan. 32; Stevens v. State, 31 Ind. 485; Wright v. People, 4 Neb. 407: Westmoreland v. State, 45 Ga. 225; Brotherton v. People, 74 N. Y. 162; Whart. Crim Ev., sec. 340; 1 Bish. Crim. Proc., sec. 534.

To constitute any crime certain elements are necessary. For instance, to fix upon any one the crime of murder in the first degree there must exist the following facts: The fact that a homicide has been committed; the defendants agreeing therein (the two together constituting the *corpus delicti*);[4] sanity or legal responsibility; malice; premeditation; deliberation. Except for the element of sanity, which being the normal condition of the mind is presumed to exist, each of these essential ingredients of this high offense must be established beyond a reasonable doubt before a conviction can be had. If, after the submission of the whole case, a reasonable doubt remains in the minds of the jury as to the existence of the element of deliberation, they must find the defendant not guilty of the higher and convict of the next lower grade of crime.[5] If a reasonable doubt remains concerning deliberation and *malice prepense* there is a further reduction to manslaughter.[6] If the jury have a reasonable doubt of the defendant's presence and agency in the commission of the crime, they are bound to acquit him.[7] These special declarations of law concerning the individual elements necessary to constitute the crime, flow inevitably, and as a logical sequence, from the general proposition that a reasonable doubt of the accused party's guilt, entitles him to an acquittal. When there is a reasonable doubt of the existence of an element necessary to any degree of guilt, there is, *pro facto*, a reasonable doubt of the existence of the guilt itself. Sanity is supplied in the State's case by a rebuttal, *prima facie* presumptive of law.[8] Similarly, when the unlawful killing is shown to have been done with a dangerous weapon, the malice requisite to constitute the offense is presumed to exist.[9] The latter presumption is fully met and repelled by the introduction of evidence sufficient to raise in the minds of the jury a reasonable doubt that the act was done with malice.[10] Why, then, should courts muddy the clear logic of the law by declaring that the equally rebuttable presumption of sanity can only be repelled by establishing insanity affirmatively and to the reasonable satisfaction of the jury.[11] No amount of judicial ingenuity can avoid the plain argument. A reasonable doubt of any essential element of guilt is a reasonable doubt of guilt; sanity is an essential element of guilt, and hence a reasonable doubt of sanity is a reasonable doubt of guilt. To compel an accused party to establish his insanity is, in every instance, equivalent to compelling him to establish his innocence. And when in such cases the courts will not authorize an acquittal upon any less weight of evidence than a preponderance, do they not upset the general doctrine concerning reasonable doubt and the *onus probandi*? But it is said he asserts insanity as a fact in his defense, and hence he must prove it as such. Certainly, most wise and logical Daniel, and if he asserts that he was not there and sets up an *alibi*, "as a fact in his defense," then he must prove his absence by a preponderance of testimony or to the reasonable satisfaction of the jury (?) which happens not to be the law.[12] Again, it is said that while the defendant pleading insanity in his defense is required to satisfy the jury that he was insane, he is nevertheless protected by the general instruction that if, upon the whole evidence, the jury have a reasonable doubt of guilt, they must acquit. This simply amounts to judicial stultification. We may fancy an intelligent juror so instructed going through a mental process something like this: "The only question raised in this case is, whether or not the prisoner was sane at the time he committed the act for which he is now tried. Of course, if he was not sane, he can not be guilty of crime. Now, while I am not reasonably satisfied that he was insane, still I have very grave doubts as to whether he was sane, or legally responsible; and, having these doubts as to his responsibility, I can not say on my oath that I believe him guilty beyond a reasonable doubt. To doubt his responsibility is to doubt his guilt; and hence under this general instruction of the court I

4 Whart. Crim. Ev., sec. 625.
5 Whart. Crim. Ev., secs. 340 and 721.
6 Whart. Crim. Ev., sec. 334, and cases cited.
7 Whart. Crim. Ev., sec. 333, and cases cited.
8 Whart. Crim. Ev., sec. 729.
9 State v. Mitchell, 64 Mo. 191.
10 State v. Alexander, 66 Mo. 148; State v. Wingo, 66 Mo. 181.
11 State v. Redemeier, 71 Mo. 173, and cases cited. Henry, J., dissenting.
12 Whart. Crim. Ev., sec. 333; Binns v. State, 46 Ind. 311; Stuart v. People, 42 Mich. 225; Dubose v. State, 10 Tex. App. 230; State v. Jaynes, 78 N. C. 504.

ought to vote in favor of acquittal. But here is another instruction which tells me that a reasonable doubt of sanity or responsibility is not enough to warrant a verdict of not guilty, but I must be reasonably satisfied of his insanity or irresponsibility before I can acquit. But I am not satisfied reasonably that he was insane; and hence it seems that under this special instruction of the court, I must find the defendant guilty." Here, in precisely the same state of mental conviction with regard to the facts, the juror, by following one instruction, would acquit, and by following the other would render a verdict of guilty. Cæsar is reported to have once remarked that he did not understand how the Roman augerers could look each other in the face without laughing. It seems equally unaccountable how able and learned judges can declare such legal doctrines as are here discussed, and yet not appreciate the exquisite logical absurdity of their position. Everybody knows that the ordinary verdict of "not guilty" is in no sense an affirmative finding of innocence, but imports no more than that the defendant's guilt has not been established beyond a reasonable doubt. And to require in the class of cases under consideration, that the accused shall prove insanity and innocence, is to deny him the benefit of the greatest safeguard which the law in its benignity throws around every other unfortunate to shield his jeopardized life and liberty. True, by the statutory law of Missouri and other States, when a prisoner "is acquitted on the sole ground that he was insane," provision is made for his detention and confinement as a dangerous lunatic.[13] Yet, without stopping here to discuss the wisdom and justice of blending the two questions of guilt and sanity in one investigation—where the prisoner, in order to escape with his life, is compelled himself to make the proof which deprives him of his liberty—it is enough for present purposes to note the fact, that there still might, and often ought to be, an acquittal of crime upon the recognized doctrine of reasonable doubt, without any affirmative finding of insanity. A jury could agree that there was serious doubt of the man's sanity or capability of committing crime, and a consequent doubt of his guilt, without ever arriving at the positive conclusion that he was insane. If justice, in the persons of our judges, would cease to be really instead of metaphorically blind, she would see that the law as declared in this class of cases is a hopeless entanglement of antagonistic and irreconcilable doctrines. The groping jury, befogged and confused by the conflict of laws, discern arising, like a mountain out of mist, the special instruction to convict, unless insanity is proven to their reasonable satisfaction; and to the miserable object of prosecuting vengeance, seeking to avail himself of the only weakness the State's case presents, is thundered in tones of judicial authority: "Question any other essential ingredient of guilt, and a reasonable doubt of its existence sets you free; but if you strike at the element of sanity, you must prove your innocence or die." Some in alarm may reply to this reasoning, that already too many ably-defended criminals are released on this pretext of insanity, and that any greater laxity in declaring the law would be a crying outrage on society, which laws are made to protect. When those who thus speak will advance this as a reason why an important and glaring exception to the general doctrine of reasonable doubt is demanded by public policy—as a reason why accused parties, seeking acquittal on the issue of sanity or insanity, should be deprived of the great advantages which that general doctrine secures in all other cases; then the inquiry will assume the phase of an honorable controversy which may be maintained with consistency and candor on both sides. But as long as the humanity of the law is of professedly universal indulgence, this argument is unworthy of the learned courts which utter it. For the honor of the judiciary, whom this question most concerns, they should not approach a jury in a matter of life and death with the merciful doctrine of "reasonable doubt" in one hand, and the remorseless special instruction in the other—trying to blend oil and vinegar, hope and despair; to mix the unmixible.

Kansas City, Mo. R. E. B.

[13] 2 Rev. Stat. Mo. 1879; sec. 414, *et seq.*

HOMESTEAD — WHAT RESIDENCE NECESSARY.

RESKE v. RESKE.

Supreme Court of Michigan, October 17, 1883.

A city lot, purchased by a single man in contemplation of his marriage, and with the intention of making it a homestead, will be exempt as such from the levy of execution, even before any dwelling is erected on it, if the man and his wife have inclosed, improved, and used it with the constant purpose of making it their home as soon as their means will permit.

Appeal from the Superior Court of Detroit.

John Atkinson and *Isaac Marston*, for complainant and appellant; *C. J. Reilly*, for defendant.

COOLEY, J., delivered the opinion of the court:

The bill in this case is filed to protect a homestead right, and to enjoin a threatened sale upon execution. The facts appear to be that in January, 1880, complainant purchased a city lot on the corner of Chene and Morton streets, in Detroit, intending to make of it a homestead. He was then a single man, but was anticipating the arrival very shortly of a young woman from Germany whom he was to marry. The woman came on, and they were married immediately, according to the previous expectation. Neither of them seems to have had means, but they caused the lot to be fenced, and commenced making use of it in connection with the business of selling wood. A barn and a shed were built, a well was dug, complainant kept his horses on the lot, and also hogs and poultry. Mrs. Reske assisted her husband in his business, and received orders for wood, and wood, to some extent, was piled on the lot for sale. At first complainant lived with his wife at some considerable distance from the lot, but soon took board across the way, and remained there while building. In the spring of 1881 complainant talked with a builder about the cost of a house, and obtained his figures, but not being able to go on then, the matter was left in abeyance. As complainant and his wife earned anything they put it in improvements on the lot; to give his language: "I built every day, as soon as I got a little money ahead." It was toward the end of 1882 before they were able to put up a house, and they were not living in this until January, 1883.

Meantime defendant, on November 28, 1882, had obtained a judgment against complainant for $546.77 and costs, and by virtue of an execution on this judgment had caused levy to be made upon this lot before complainant had commenced building his house, and was proceeding to a sale when this bill was filed. The value of the lot, as now improved, is shown to be under $1,500. Defendant, by her answer to the bill, contests the fact of the lot having been purchased by complainant for a homestead, and gives evidence of statements made by him that he bought the lot for use in connection with his business. We are entirely satisfied, however, that his intention to make it a homestead existed from the time of purchase, and that he proceeded to do so as rapidly as he could earn the means.

The question now is whether, on the facts recited, the lot had become a homestead in a legal sense before the levy was made upon it. We are of opinion that it had. The lot, as has been said, was procured for the purposes of a home, and complainant, aided by the industry and frugality of his wife, was proceeding to make it such as rapidly as their limited means would permit. They inclosed it; they had their domestic animals upon it; they came to live in the immediate vicinity; they made a well; and they put up outbuildings. Everything but the dwelling proper had been erected before the levy was made, and complainant was bargaining with a builder for a house. If anything was lacking to make the lot a homestead it was because the poverty of complainant had precluded his advancing his improvements as rapidly as he desired. The lot, however, in the minds and hearts of complainant and his wife, had been appropriated as a home from and before the day of their marriage; it was all the home they had; it represented all their scanty means, and was the center of their domestic hopes and aspirations. They did not as yet sleep upon it, or take their meals upon it; and probably if they had done this in some of the buildings already constructed their right to claim a homestead would not have been disputed. But this is not an indispensable condition. The man who buys a home which is all ready for occupancy can not have it taken from him as he is attempting to move in his goods, because he has not yet eaten or slept within it. Any one might be deprived of a homestead if so narrow a construction of the privilege should prevail. It is people like this complainant and his wife, with very limited means, that the law encourages with the promise to save their homes to them if they will but secure one, and it would be a deceptive promise if it were only made on conditions which any creditor might so easily defeat. We think it was meant to be effective in cases like the present, and that complainant is entitled to the relief he prays.

Decree will be entered for complainant, with costs of both courts.

The other justices concurred.

FRAUDULENT PURCHASE — INTENT NOT TO PAY.

LINDAUER v. HAY.

Supreme Court of Iowa, October 17, 1883.

1. Where a purchaser of goods, who is at the time insolvent to his own knowledge, permits a false statement of his condition to remain upon the record of a mercantile agency, intended to give him credit, and

three days after the purchase makes an assignment, a jury will be warranted in finding fraudulent intent not to pay for goods.

2. To constitute a fraudulent intent that will defeat a sale, it must be shown that the purchaser did not intend to pay for the goods.

3. Where it appears that a party asking a new trial on the ground of newly-discovered evidence could, by the exercise of proper diligences have offered such evidence on the former trial, the motion should be denied.

Appeal from Black Hawk Circuit Court.

Action of replevin to recover specific goods and merchandise. Upon a verdict for plaintiffs a judgment was rendered, and defendants appeal. The facts of the case appear in the opinion.

J. L. Husted and *C. W. Mullen*, for appellants; *H. Boies*, for appellee.

BECK, J., delivered the opinion of the court:

1. The petition of plaintiffs is in two counts—the first alleging that on the twenty-seventh day of July, 1881, defendant Hay, being in the business of selling clothes at Waterloo, ordered the goods replevied, which belonged to that line of trade, from plaintiffs, who were doing business at Chicago. On the twenty-ninth of the same month the order was accepted and filed, and the goods were shipped, and were received by Hay, at Waterloo, on the fifth of the following month. Before accepting the order, plaintiffs sought information of Hay's financial responsibility from a commercial agency, to whom Hay had made a statement, for the purpose of its being used to advise those of whom he made purchases of his true condition. Plaintiffs were advised by the agency of the substance of Hay's statement, which showed him to be solvent, and worth, above his debts, more than $19,000. The statement was made by Hay January 17, 1880, and no other one was subsequently made to the agency. Upon the faith of the report so made by the commercial agency, plaintiff sold Hay the goods. Plaintiffs allege, in substance, that at the time the goods were ordered and delivered, Hay was insolvent, and had knowledge of his condition as it stood upon the books of the commercial agency, and that plaintiffs would seek information thereof from that source, and that when he purchased the goods Hay intended to defraud plaintiffs, and intended not to pay them for the goods, and concealed from plaintiffs his true financial condition. On the eighth day of August, 1881, Hay made a general assignment of his property, for the benefit of his creditors, to defendant Conger, under which he took and holds possession of the goods. It is alleged that plaintiffs, upon the discovery of the fraud of Hay, rescinded the contract of sale, and notified both defendants thereof, and demanded the return of the goods.

The second count in the petition alleges, in addition to averments of the sale and delivery of the goods, the assignment to Conger and the rescission of the sale and the demand for the return of the property, and that Hay ordered and secured the good with the fraudulent purpose of not paying for them, and in order to accomplish such purpose fraudulently concealed his insolvency from plaintiffs, of all which plaintiffs at the time had no knowledge or information. The action was commenced August 8, 1881. The defendants, answering the petition, admit the sale and delivery of the goods, their assignment to Conger, and the demand for the return by plaintiffs, but deny all allegations of fraud and concealment upon which plaintiffs base the claim of right to rescind the contract of sale.

2. At the close of plaintiffs' evidence the defendants asked the court to withdraw the case from the jury and direct a verdict for defendants, upon the grounds—first, that there was no evidence tending to prove that Hay's statement made to the commercial agency was, when made, false, or that it was made with a fraudulent intent, in order to obtain credit to which he was not entitled; second, that there is no evidence to prove that Hay, when he purchased the goods, did not intend to pay for them. The motion was overruled, and this decision of the court is the ground of defendants' first complaint. The first ground of the motion is directed against evidence applicable to the first count of the petition. We are inclined to the opinion that it is not well taken. From a statement made by Hay as to his losses and business, reaching to a time anterior to the date of his statement, the jury could well have found that when it was made he was insolvent. But if there be doubt upon this point, there can be none that there is evidence supporting the verdict upon the issues presented by the second count of the petition, which we will now proceed to show.

3. The defendants insist there was no evidence tending to show Hay's intention not to pay for the goods, entertained when he purchased and received them. We are clearly of the opinion that there was such evidence submitted to the jury. Fraudulent intentions can rarely be proved by direct evidence, as expressions of the mind or declarations of the purpose. They are usually established by circumstances from which they may be inferred. Upon a similar question, arising in a case somewhat like the one at bar, this court uses the following language: "The fact that the intention of the vendee, the virus which poisons the act, rests in his own breast, will not defeat the remedy which the law provides against the fraud. It may be shown by proof of its manifestations. These are usually the acts done by the wrongdoer, and the circumstances surrounding him and the transaction." Oswego Starch Factory v. Lendrum, 57 Iowa, 573 (583); s. c., 10 N. W. Rep. 900. In the case at bar Hay was insolvent when he ordered and received the goods, and had been for some time. He permitted a false statement of his condition to remain upon the record of the mercantile agency, intended to give him credit; he was aware of his insolvency, as shown by his own statement of his losses and business; he

knew that he had not the financial ability to pay for the goods, and made the assignment within three days after he received them. From these facts the jury were authorized to infer and find his fraudulent intent not to pay for the goods.

4. It is urged that the second count of the petition fails to allege Hay's fraudulent intent not to pay for the goods, and his concealment of such intention. But the count does contain an averment of such intent, and no objection was raised in the court below, either by demurrer to the petition or by instruction to the jury, or in any other manner, based upon this ground now urged by the defendants. The objection can not be first raised in this court. There was evidence sufficient to authorize the jury to infer that Hay did conceal his fraudulent purpose not to pay for the goods.

5. The defendants asked the court to give an instruction that contained a direction to the jury in the following language: "It is not essential to the good faith of the instruction that he [Hay] should have a reasonable expectation of being able to pay his indebtedness. It is enough if he intends to pay for the goods he then buys." It is insisted that this instruction conveys the thought that to sustain the sale it was not necessary to show that Hay should have a reasonable expectation of paying all his debts; that if he intended to pay plaintiff the sale would be valid without regard to his ability, expectation and intention as to his other indebtedness. It is unnecessary to inquire whether the instruction is correct, giving it the construction insisted upon by defendants, which, to say the least of it, is doubtful, for the reason that the same thought is expressed quite as directly and intelligibly, if not more so, in the seventh and eighth instructions given by the court. In the seventh instruction, the jury are informed, in substance, that plaintiff can not recover unless they find from the evidence that Hay did not intend to pay for the goods involved in the suit; and the eighth instruction declares that to constitute the fraudulent intent which would defeat the sale, it must be shown that Hay did not intend to pay for the goods in question.

6. The defendants asked the court to instruct the jury that "if no inquiries are made, the purchaser of goods is not bound to disclose his pecuniary condition either at or before the sale, although he is insolvent, and knows himself to be insolvent." This instruction was refused, and this ruling is now complained of by defendants. The thought of this instruction is conveyed in the ninth instruction given. It was not necessary to repeat it in the form in which it was presented by defendants.

7. The defendents based a motion for a new trial upon evidence discovered after the verdict. This evidence is of a witness who had been employed by Hay in connection with auction sales, and is to the effect that the proceeds of such sales were remitted to Hay's creditors. Without inquiring whether the evidence is material, and ought to lead to a different result in a new trial, it is sufficient to say that defendants fail to show diligence for the discovery of the evidence before or during the trial required by Code, sec. 2837.

It is admitted that the witness, whom defendants claim would testify to the facts stated, was during the trial, and for weeks before, associated and employed with Hay in a store in Waterloo, where the case was tried, and was in Waterloo during the trial. Hay was a witness at the trial, and seems to have given all the evidence required of him as to the condition of his business and indebtedness. If the newly-discovered evidence had been thought important, the defendants could only have omitted inquiry of Hay and the witness through negligence. The motion for a new trial was properly overruled.

The foregoing discussion disposes of all questions raised by defendants' counsel. The judgment of the circuit court is affirmed.

LIFE INSURANCE—CO-OPERATIVE—SUICIDE.

KNIGHTS OF THE GOLDEN RULE v. AINSWORTH.

Supreme Court of Alabama.

Where a co-operative society issues a benefit certificate, expressed to be "subject to the laws of the order then in force or thereafter to be enacted," and subsequently enacts a by-law which provides that such a certificate shall be forfeited if the member, whether sane or insane, shall take his own life, such certificate becomes forfeited upon the suicide of such member.

BRICKELL, C. J., delivered the opinion of the court:

A contract of insurance is defined as an agreement by which one party, for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the risk) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance the thing insured is property; in life or accident insurance, it is the life or health of a person. Commonwealth v. Weatherbee, 105 Mass. 169. The instrument in writing upon which this suit is founded, and which is set out in full in the complaint, is entitled "Knight's Benefit Certificate," and has the elements and characteristics of a contract of life insurance. It purports to have been issued by the "Supreme Commandery of the Knights of the Golden Rule," which is averred to be a corporation created and organized under a law of the State of Kentucky. The Commandery thereby promise, on the death of the husband, the appellant, to pay her $2,000, in consideration of the husband having become a member of the order and having paid the fee for admission to membership, and of his payment in the future

of all assessements levied and required by the Supreme Commandery, and upon the condition that he remained a member of the order in good standing, and complied with all its laws then of force or subsequently enacted. These are the essential elements of a contract of life insurance, made by a mutual insurance company with one of its members. Life is the risk, and death is the event upon which the insurance money is payable. There is not, as in the ordinary contracts or policies, a stipulation for the payment of premiums fixed and certain in amount at the inception of the risk, and at periods definitely appointed during the continuance. The payment of the fee for admission to membership, and of the assessments levied and required by the Commandery, are the equivalent of premiums, and form the pecuniary consideration of the contract. The condition expressed that the assured shall remain a member of the order in good standing, observing its laws, is the expression of that which is implied in all insurance of members by mutual companies. The members of such companies are presumed to know the charter and by-laws, and to contract in reference to them, though they may not be recited or referred to in the contract. Bliss on Life Insurance, sec. 463, *et seq.*; May on Insurance, sec. 452. Nor is the character or legal effect of the contract varied, because the objects and purposes of the association are benevolent and charitable, rather than speculative, or the derivation of profits from the transaction of business. There are many such associations, having various names, and similar objects and purposes, which are, in contemplation of law, mutual life insurance companies, and as such their contracts are construed and enforced by the courts. Policies, or certificates, issued by them, have the essentials and characteristics of such contracts; the payments by the one party in some form and under some designation of a pecuniary consideration, and the observance of prescribed duties during the continuance of the risk; and the promise and obligation of the other party, when death happens, to pay the sum assured. Commonwealth v. Weatherbee, *supra;* Bolton v. Bolton, 73 Me. 299.

The plea interposed does not deny the death of the assured; nor that while living he paid the assessments levied and required by the Supreme Commandery; nor that at the time of death he was a member of the order in good standing. The averments are that he came to his death by taking his own life, and that at the time of the issue of the certificate there was a general law of the association rendering it a condition upon which a certificate could issue, and upon which its benefits could be realized, that the member to whom or upon whose life it was issued should comply with the "General Laws of the order then in existence, or which might thereafter be enacted;" that the present certificate was issued and was by the assured accepted in writing, "subject to the laws of the order now in force or which may hereafter be enacted by the Supreme Commandery." On its face the certificate recited, among other things, that "any violation of the requirements of the laws now in force, or hereafter enacted, governing the order or this class, shall render this certificate null and void." And in another place it is recited as a condition upon which the obligation of the certificate depends: "The full compliance with all the laws of the order now in force or that may hereafter be enacted." The plea further avers the enactment or adoption of a law by the terms of which a certificate of this class was forfeited, if the member, whether sane or insane, should take his own life, the enactment of which was subsequent to the issue of the certificate. The point of controversy is, whether this law, by force of the recitals and stipulations to which we have referred, enters into and forms part of an antecedent certificate, avoiding it in the event a member, whether sane or insane, should take his own life.

The power to make by-laws for the government of the corporate body, fixing and regulating its own duties and those of its members, not inconsistent with its charter or the purposes and objects of its creation, not repugnant to the common law or to the laws of the State, constitutional and statutory, is an attribute of every corporation. The power is regarded as of so much importance that it is seldom left to implication, but is in express terms conferred by the law from which corporate existence is derived. 2 Kent, 297; Ang. & Ames Corporations, sec. 110; 2 Waits' Actions & Defenses, 366. When duly enacted by the body to whom the corporate legislative power is delegated, by-laws are binding upon all the members of the corporation, who are presumed to know them, and to contract in reference to them. Ang. & Ames Corporations, sec. 325; Bliss on Life Insurance, sec. 463. It is the existing by-laws which are presumed to be known, and in reference to which it is presumed corporate contracts are made, as it is the existing municipal law of the place in which a contract is made or is to be performed, that parties are presumed to be conversant with, and which incorporates itself into the contract, measuring their rights and duties. A corporation has not capacity, as the legislative power from which it derives existence has not competency, by laws of its own enactment, to disturb or divert rights which it had created, or to impair the obligation of its contracts, or to change its responsibility to its members, or to draw them into new and distinct relations. Ang. & Ames Corporations, sec. 399; Bliss on Life Insurance, sec. 463; Becker v. Farmers' Ins. Co., 48 Mich. 610; Hamilton Mutual Ins. Co. v. Hobart, 2 Gray, 543; Great Falls Mut. Ins. Co. v. Harvey, 45 N. H. 292.

The certificate is silent as to the consequence if the member, whose life was assured, should die by his own hands; and the by-laws of the association, or order, when the certificate was issued, contained no provision declaring in that event an avoidance or forfeiture of the certificate. We are

not aware that it has been anywhere expressly denied that voluntary self-destruction by one whose life was insured and of whose sanity there was no question, would void the contract of insurance, or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession or admission that such is the law. In Moore v. Woolsey, 4 Ell. & Black. 243, Lord Campbell said: "If a man insures his life for a year, and commits suicide within the year, his executor can not recover upon the policy; as the owner of a ship who insured her for a year, can not recover upon the policy if within the year he caused her to be sunk; a stipulation that in either case, upon such an event, the policy should give a right of action would be void." In Amicable Insurance Society v. Bolland, 2 Daw. & Clark, 1 (known as Fauntleroy's Case), it was held by the House of Lords, that, though there was not in the policy an exception of the liability of the insurer, in the event the assured came to his death by the hands of public justice, the exception would be implied, for the reason that an express contract for liability in that event would contravene good morals and sound policy. The inference or implication of the law was, therefore, that the execution of the accused by the hands of public justice, for the commission of crime, is not within the risk of the policy. A construction, or an implication, which will preserve the legality of the contract, is preferred to one which will have the opposite effect. Referring to Fauntleroy's Case, it was said by Wood, V. C., in Horn v. Anglo Australian and Universal Family Life Insurance Co., 7 Jur. (N. S.) 673: "The argument might be pursued, although I do not know that any case has been so decided, to the same extent that in the case of a person committing suicide, while in a sane state of mind, thus committing a felony and losing his life thereby." In Hortman v. Keystone Ins. Co., 21 Pa. St. 466, Black, C. J., said that though the policy was silent in reference to self-destruction, if the assured committed suicide he was "guilty of such a fraud upon the insurer of his life, that his representatives can not recover for this reason alone." Hunt, J., however, said of this case in Life Ins. Co. v. Terry, 15 Wall. 586, that it was "in this respect confessedly unsound." The case, in its entirety, is not supported by the current of authority. It rules that an exception in the policy expressed in the words, "should die by his own hands," must be severed and dissociated from other exceptions expressed in words involving the self-criminality of the assured, and to be construed by themselves, and imported "any sort of suicide," leaving it in doubt whether "suicide" expressed intentional, voluntary or involuntary accidental self-destruction.

A contract of life insurance is simpler in form, in the relative rights and duties of the insurer and the assured, and differs in many respects from marine or from fire insurance; yet the general principles applicable to marine or fire insurance are applied, so far as consistent with the nature and obligations of the contract, to the contract of life insurance. In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property or health or life, is usually subject to, and the assured can not voluntarily and intentionally vary them. Upon settled principles of public policy and morals, the fraud or the criminal misconduct of the assured is, in contracts of marine or fire insurance, an implied exception to the liability of the insurer. Waters v. Merchants' Louisville Ins. Co., 11 Pet. 213; Citizens' Ins. Co. v. March, 41 Pa. St. 386; Chandler v. Worcester Mutual Fire Ins. Co., 3 Cush. 328. Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It can not be in the contemplation of the parties, that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money.

The doctrine asserted in Fauntleroy's Case, that death by the hands of public justice, the punishment for the commission of crime, voids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which supported the doctrine seem to lead of necessity to the conclusion that voluntary criminal self-destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or, rather, not within the risks contemplated by the parties, reluctant as the courts may be to introduce, by construction or implication, exceptions into such contracts, which usually contain special exceptions.

An express contract to pay the insurance money to the assured, in the event he committed suicide, an increased premium being paid because of the risk, there could be but little, if any, hesitancy in repudiating as offensive to law and good morals. The fair and just interpretation of a contract of life insurance made with the assured is, that the risk is of death proceeding from other causes than the voluntary act of the assured producing, or intended to produce it. And especially of a contract made by an association or organization with one of its members, the object and purpose of which are, that the members will contribute to and bear each other's losses, or the losses of those dependent upon them. The extinction of life by disease, or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the

assured may safely commit crime. Bliss on Life Insurance, secs. 242-3.

The by-laws, or general law, adopted by the Commandery, subsequent to the issue of the certificate, so far as it declares a forfeiture or voidance of the certificate in the event a member who is sane takes his life, is not objectionable upon the ground that it varies or impairs existing contracts. It adds no new term or condition to the contracts; it relieves the association from no responsibility; it imposes no new or additional duty upon the members, and works no change in their relations. It is the mere declaration or expression of the implication of the law; and "the expression of those things which the law implies works nothing." 2 Parsons' Contracts, 515. The law employs the phraseology (and the plea pursues it), not now of unfrequent use in contracts or policies of life insurance: "take his own life." These words, when used in a policy of life insurance, have a known and definite legal signification importing suicide, that the member must not become a *felo de se;* must not "deliberately put an end to his own existence, or commit any unlawful, malicious act, the consequence of which is his own death;" and this implies that he must be "of years of discretion, and in his senses." 4 Black, 189. Contracts of insurance, like other contracts, are interpreted so as to meet and satisfy the intention of the parties. Whatever may be the phrase employed, expressive of self-destruction, which is to operate a forfeiture, it not otherwise qualified or limited, whether it be "commit suicide," or "death by suicide," or "death by his own act," or "take his own life," or other equivalent expression, it would be most unreasonable to interpret it as including death by accident, or by mistake, though the direct, immediate act of the assured may have contributed to it. The firing of a weapon not supposed to be loaded, or its discharge not directed against or intended to reach the person, may cause death. Poison may be taken instead of a curative medicine, by accident or by mistake, and the accidents or mistakes from which death may result are innumerable. An extinction of life unintentional, involuntary, will not fall within such expressions, intended to guard the insurer against the positive, intentional acts of the assured. 2 Parsons' Contracts, 475; Bliss on Life Insurance, sec. 225; Life Ins. Co. v. Terry, 15 Wall, 580; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. 567; s. c., 19 Am. Rep. 623.

The plea consequently attaching to its words their known legal signification, when used in or applied to contracts of life insurance, imports voluntary, intentional deprivation of self-existence by the assured while in his senses. The omission of the word willful, as descriptive of the self-destruction, did not render the plea demurrable. If that word had been added, or any similar word, evidence of an intentional, not of an accidental, self-destruction, would have met averment. Evidence of no other than an intentional act will satisfy the present averment. Such an act being shown, if it is intended to excuse it because of the mental unsoundness of the assured at the time of its commission, the fact, the matter of excuse, ought to have been replied to by the plaintiff. The presumption of law is in favor of sanity, and the burden of proving insanity rests upon the party alleging it. Bliss on Life Insurance, sec. 378; Terry v. Life Ins. Co., 1 Dillon (Cir. Ct.) 403; Phadenhauer v. Germania Life Ins. Co., *supra*.

Policies of life insurance usually contain an exception of the liability of the insurer in the event of the self-destruction of the assured. There is a contrariety of decisions as to the effect of the exception; whether it embraces any and every act of intentional self-destruction, or only suicide, criminal self-destruction. The preponderance of authority points to the conclusion that it refers solely to suicide. Life Ins. Co. v. Terry, *supra;* Phadenhauer v. Germania Life Ins. Co., *supra*; De Gorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232; Bliss on Life Insurance, secs. 225-238.

With a view of excepting from the operation of policy any intended self-destruction, whether the assured is sane or insane at the time of its commission, insurance companies are in the habit of inserting in policies a provision, the equivalent of that expressed in the law of the association now under consideration. The exception as to the insane has been supported, and it is said to be as much the right of the insurer to stipulate for exemption from liability in the event of intentional self-destruction by the insane, as to stipulate for an exemption from liability because the hazard of loss is increased from the fact of the assured engaging in occupations perilous to life, or taking up residence in an unhealthy climate. Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284. In this respect the law adds a new term to the contract, relieves the association from an existing liability and lessens the value and security of the certificate of the assured.

It is not claimed that there is an inherent power in the association by the adoption of a by-law to work such radical changes in its existing contracts. The power is derived from and depends upon the stipulation of the contract at the time it was made. These stipulations are expressed in varying terms, and several of them import no more than would be implied in the observance by he assured of the requirements of the association, such requirements as were reasonable, and intended to promote the harmony of the association and the purposes and objects for which it was formed. They import also obedience to the by-laws, so far as reasonable, consistent with the charter and the law of the land. We do not construe them as reserving, or as intended to reserve, to the association the power to change or void its contracts, to lessen its responsibilities, or to divest its members of rights. This is not the proper office of a by-law; and from the general expressions to which we are referring, it can not be

fairly presumed that it was contemplated or intended to affect the members by other than such by-laws as it was within the competency of the association to enact. But in addition to these the averment of the plea is, that the certificate was accepted by the assured, "subject to the laws of the order now in force, or which may be hereafter enacted by the supreme commandery." These are words of large signification, and clearly express that the assured consented that the contract should be subject to future as well as to existing by-laws. Parties may contract in reference to laws of future enactment, may agree to be bound and affected by them if such laws were existing. They may consent that such laws may enter into and form part of their contracts, modifying or varying them. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputation of injustice. An engagement of suretyship relating to a particular office, with prescribed duties, by the common law extends only to such duties as are prescribed when the engagement is entered into, and not to such as while the suretyship is continuing may be attached to the office. Chitty Contracts, 11th Am. Ed. 765, note. The statute prescribing the condition of official bonds, and of the bonds of executors, or administrators, or guardians, extends the liability of the surety to performance by the principal of such duties as are required of him by existing laws, or by any law passed subsequent to the execution of the bond. Morrow v. Wood, 56 Ala. 1.

There is no injustice in the statute; nothing retrospective in its operation. The surety enters into the bond with knowledge of the condition, assenting that his liability may be enlarged, if public interest and convenience require that the official duties of the principal should be enlarged.

In consequence of the settled doctrine that the charter of a corporation, whether private or eleemosynary, not instituted as part of the machinery of government, but for the private benefit or purposes of the corporators, is a contract between the State and the corporators, protected by the Constitution of the United States from repeal or alteration, or impairment by subsequent legislation, it has become usual, either by constitutional provision, or by a general law, or by reservation in the charter, to clothe the legislative power of the State with full capacity, at pleasure, to alter, modify or repeal the charter. The power being reserved, its exercise can not, of course, be said to impair the obligation of the grant. Ang. & Ames Corporations, sec. 969; Cooley Con. Lim., 340. The power is reserved by and is a part of the grant, and that it may be exercised is a condition upon which the grant of corporate existence and franchises is accepted.

The members of associations created for purposes and objects like those which seem to be the purposes and objects of this organization, may very properly be required to assent that the contract conferring upon them rights, shall be subject to and dependent upon the future as well as the existing laws adopted by the governing power. The fundamental principle of such organizations is the mutuality of duty and equality of right of the membership, without regard to time of admission. This can not well be preserved, if the members stipulating for benefits were not required to consent that they would be subject to future as well as existing by-laws. Time and experience will develope a necessity for changes in the laws, and if the consent was not required, there would be a class of members bound by the changed laws, and a class exempt from their operation, that the case before us is an illustration of the legality and propriety of the provision relieving the association from liability, if a member while insane deprived himself of life, there is no good reason to question. If no other reason could be given, that it relieves the association from litigating with the representatives of a deceased member the distressing question of his sanity, would be sufficient. If the law was applied only to certificates issued subsequent to its enactment, there would be a class of members having certificates of greater value than the certificates held by another class, yet each class would be subject to the same assessments and the same duties. There is but little room, if any, for the apprehension that advantage will be taken by the governing body of assent of the member to be bound and affected by subsequent laws, to impose upon him unjust burdens, or to vary the contract, save so far as an alteration or modification of it may be promotive of the general good. Subsequent or existing by-laws are valid only when consistent with the charter, and confined to the nature and objects of the association. While a subsequent law, because of the assent of the member, may add new terms or conditions to a certificate—terms or conditions reasonably calculated to promote the general good of the membership—may be valid and binding, it does not follow that a law operating a destruction of the certificate, or a deprivation of all right under it, would be of any force. Korn v. Mutual Ins. Association Society, 6 Cranch, 197.

Without pursuing the discussion of the question, we are of opinion that the parties intended the certificate should be subject to the laws of the association adopted subsequent to its issue—laws which, if they had been of force at the time of the issue, would have entered into and formed part of it. It is the concurring assent of the parties that engrafts the law upon the certificate, giving it an operation it would not have otherwise.

The circuit court erred in sustaining the demurrer to the plea, and its judgment is reversed and the cause remanded.

WEEKLY DIGEST OF RECENT CASES.

1. APPELLATE PRACTICE — MOTION TO QUASH INDICTMENT NOT REVIEWABLE.

A motion to quash an indictment being addressed to the discretion of the court, a decision thereon is not subject to review on a writ of error. The Supreme Court can not take cognizance of a division of opinion between the judges of a circuit court on a motion to quash an indictment. *United States v. Hamilton*, U. S. S. C., Oct. 15, 1883; 3 S. C. Rep. 9.

2. CHATTEL MORTGAGE — STOCK IN TRADE — FARM STOCK AND IMPLEMENTS — FRAUDULENT CONVEYANCE.

A conveyed to plaintiff, as trustee, to secure a certain debt, certain tracts of land, and also all and singular the farming implements, tools, the live dairy cattle now on said farm, together with all their increase to the value of said tools, implements and cattle of four thousand dollars, and that A, during the lien, shall keep up on said farm a stock of live diary cattle and increase thereof, and substitutes therefor, and farming implements and tools which shall be worth $4,000. The circuit court held this deed of trust as to the personal property void as to the creditors of the grantor. *Held*, it is well settled that when it appears from the face of the deed of trust or mortgage that the goods mortgaged were to remain in the possession of the grantor, to be disposed of by him in the usual course of trade, the deed is void as to creditors; and though this deed does not in express terms authorize the grantor to dispose of the property, the power to do so is implied from the authority given to substitute other property of the kind conveyed. *Goddard v. Jones*, S. C. Mo., Oct. Term, 1883.

3. CONSTITUTIONAL LAW—CIVIL RIGHTS ACT OF MARCH 1, 1875—THIRTEENTH AND FOURTEENTH AMENDMENTS.

The first and second sections of the Civil Rights Act, passed March 1, 1875, are unconstitutional enactments as applied to the several States, not being authorized either by the thirteenth or fourteenth amendments of the Constitution. The fourteenth amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not a direct legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts. The thirteenth amendment relates only to slavery and involuntary servitude (which it abolishes); and although, by its reflex action, it establishes universal freedom in the United States, and Congress may probably pass laws directly enforcing its provisions; yet such legislative power extends only to the subject of slavery and its incidents; and the denial of equal accommodations in inns, public conveyances and places of public amusement (which is forbidden by the sections in questions), imposes no badge of slavery or involuntary servitude upon the party, but, at most, infringes rights which are protected from State aggression by the fourteenth amendment. Whether the accommodations and privileges sought to be protected by the first and second sections of the Civil Rights Act, are, or are not, rights constitutionally demandable, and if they are, in what form they are to be protected, is not now decided. Nor is it decided whether the law, as it stands, is operative in the Territories and District of Columbia, the decision only relating to its validity as applied to the States. Nor is it decided whether Congress, under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States. *United States v. Stanley*, "Civil Rights Cases," U. S. S. C., Oct. 15, 1883; 3 S. C. Rep., 18.

4. EVIDENCE—CRIMINAL CASES—RES GESTÆ.

1. In criminal cases it is essential to the admissibility of the declarations of the injured party as a part of the *res gestæ* that they were made recently after the injury and before sufficient time had elapsed for the fabrication of a story. If made after such time had elapsed, and after the *lis mota* may be supposed to exist, they are no part of the *res gestæ*, and are not admissible as such. 2. M was in his store at night with another man who, suddenly and without provocation, shot him through the head with a pistol; M, exclaiming "you have killed me," ran out at the door and around the house to the door of another room in the same house, occupied by R, which door was eighty feet from the point in the store at which he was shot; upon being admitted by R he said: "I am shot; William Kirby has shot me;" not more than two minutes elapsed between the shooting and this declaration. Upon the trial of Kirby for the shooting, *Held*, the declaration was admissible in evidence as a part of the *res gestæ*. *Kirby v. Commonwealth*, S. C. App. Va., Sept. 13, 1883; 7 Va. L. J., 673.

5. INFANCY — CUSTODY OF CHILDREN — FATHER'S CONTROL.

A father has an absolute right to the custody and control of his children until they attain twenty-one. The court never interferes with the rights of the father unless the children are made wards of court; and then only in very extreme cases. The principles on which the court acts in interfering with the rights of the father considered: Children were made wards of court and the mother was, upon the application of the father, restrained from bringing them up as Roman Catholics. Afterwards, when the father and mother were living apart, the father placed his eldest daughter at school where she was allowed to see her mother only once a month, and to write to, and receive from her mother only such letters as were submitted to the inspection of a third person appointed by the father. After the daughter had attained the age of sixteen, the father, at her own request, allowed her to adopt the Roman Catholic religion, but refused to allow her any more unrestricted intercourse with her mother. An application made to the court by the mother and daughter, that the daughter might spend her summer vacation with her mother, and that the supervision of their correspondence might be discontinued, was refused, on the ground that the circumstances of the case were not such as to justify the court in interfering with the rights of the father. *In re Agar-Ellis; Agar-Ellis v. Lascelles*, Eng. Ct. App., July 24, 1883; 32 W. R., 1.

6. INSURANCE, ACCIDENT — FORFEITURE OF POLICY.

An accident insurance contract provided that no claim should be made for death or injury caused by voluntary exposure to unnecessary danger, or by walking or being on the bridge of any railway. A train on which insured was riding at night stopped on a bridge. He went to the front platform of the car in which he was riding, and stepped off and through a hole in the floor of the bridge, causing his death. *Held*, that he did not violate the provision of the policy, and the insurance company was liable on the contract for his death. *Burkhardt v. Travelers' Ins. Co.*, S. C. Pa., Oct. 1, 1883; 28 Alb. L. J., 388.

7. JURY TRIAL — INCOMPETENCY — EXCLUSION OF PROPER PERSONS.

The objection to a juror that he is disqualified to act as such, under section 820 of the Revised Statutes, which disqualifies a person as a juror if he voluntarily took any part in the rebellion, *held*, waived by a party under indictment after he has pleaded not guilty to the indictment, and gone to trial without making such objection. Objections by reason of irregularities of this nature should be raised by the defendant, either on motion to quash the indictment or by plea in abatement, if he had no opportunity or did not see fit to challenge the array. The action of the court in excluding particular persons, who might properly have served on a jury, is not enough to vitiate all the proceedings, so as to render them null and void. Such action might afford sufficient ground for quashing the indictment, if the objection is timely and properly made. *United States v. Gale*, U. S. S. C., Oct. 15, 1883; 3 S. C. Rep., 1.

8. PARTNERSHIP—REAL ESTATE—PRESUMPTION AS TO OWNERSHIP.

1. Improvements of a permanent nature, erected upon real estate owned by one member of a partnership who holds the legal title thereto, will, notwithstanding the real estate is used as the place of business of the firm, be presumed to be the individual property of such partner until it is proven that such improvements were erected by the firm and paid for out of firm assets, or contributed as firm capital by such partner. 2. In the absence of proof of such joint ownership by the firm, or representations or conduct of the individual partner as will mislead creditors and, as to them, estop him from denying the ownership of the firm, the right of the creditor to subject such property to the payment of partnership debts, in preference to the individual debts of such partner, must depend upon the right of the partners as between themselves. 3. In a case, therefore, where all the facts proved are consistent with the ownership of such partner, and that the use alone of the property was contributed to the firm, during its existence as such, that view should be adopted, rather than one that will subject such property to partnership liabilities to the exclusion of individual creditors. *Goepper v. Kissinger*, S. C. Ohio, Nov. 13, 1883; 4 Ohio L. J., 470.

9. SLANDER—PRIVILEGE OF COUNSEL—WORDS SPOKEN IN COURSE OF JUDICIAL INQUIRY.

No action lies against a counsel or advocate for words spoken with reference to and in the course of a judicial inquiry in which he is engaged as counsel or advocate, even if such words are spoken maliciously and without reasonable and probable cause, and are irrelevant to any issue or question forming the subject of inquiry. Defendant, a solicitor, was acting as advocate for the defense of a person whom plaintiff had caused to be charged before magistrates. In the course of the inquiry, defendant made certain statements defamatory of plaintiff's character. Plaintiff sued to recover damages in respect of these statements. At the trial Williams, J., ruled that no action would lie, and directed a nonsuit. *Held*, that, even if the words were spoken maliciously with the intention to injure plaintiff, and not to assist the defense of the person accused, and without reasonable and probable cause, and were irrelevant to the inquiry, still no action would lie, and, therefore, these questions did not arise, and the nonsuit was right. *Munster v. Lamb*, Eng. Ct. App., July 5, 1883; 49 L. T. R., 252.

10. STATUTE OF FRAUDS—WHO MAY PLEAD.

1. A case to which the Statute of Frauds does not apply, and a case in which there has been such part performance of a contract as to take it out of the statute, if it did. 2. One of two joint purchasers of real estate under a verbal contract can not take a conveyance to himself, and thereby defeat his co-purchaser's right, upon a plea that the contract between them and their vendor was not in writing. *Brown v. Brown*, S. C. App. Va., July 26, 1883; 7 Va. L. J., 687.

RECENT LEGAL LITERATURE.

THE LAW OF FRATERNITIES AND SOCIETIES. By A. J. Hirschl, of the Davenport (Ia.), Bar. St. Louis, Mo., 1883: Wm. H. Stevenson.

The growth of benevolent organizations in this country within the past decade has been rapid. With objects in the main the same, societies are to be found in each State and in almost every town, with names at once dissimilar and unique. Outside of the two large and able bodies—the Masons and the Odd Fellows—Druids, Chosen Friends, Foresters, Knights of Pythias, Red Men, Members of the Ancient Order of United Workingmen, of the Royal Arcanum, of the Knights of Honor, of the Legion of Honor are met everywhere. Their combined membership in this country is estimated at the present time at something over 1,500,000, and their revenues are proportionately large. Engaged, all of them, in the insurance business—that is to say, a mutual insurance business of a peculiar and novel kind—they may be said to form a mercantile class of a somewhat peculiar nature, and it is not strange that already many questions of their powers, duties and liabilities, and the powers, duties and liabilities of their members, have been before the courts for judicial settlement.

The author has made a collection of these decisions in a monograph of eighty pages. The book will certainly be of interest and value to very many people. A variety of questions which no legal treatise that we know of would be able to furnish any considerable information upon, are here satisfactorily discussed and answered. What is the nature of such bodies? Are they partner-

ships within the rules of law as to the rights of partnerships and the liabilities of partners? Are they insurance companies within the State laws regulating such corporations? Are the members personally liable, say for the sum due from the lodge to the representatives of a deceased member? Is the certificate in all respects like an ordinary insurance policy? How is such a right enforced, forfeited or lost? To what extent are the societies permitted to decide disputes among members without an appeal to the courts of law? What are the remedies of an expelled member? To what extent have the associations the power to make by-laws? Not only the profession, but the officers and members of these varied societies will be indebted to Mr. Hirschl for his valuable labors and investigation in this direction.

We have not space to notice the decisions collected in these pages at any length, though there are several which are more than ordinarily interesting. In Ballou v. Sole, 7 N. W. Rep. 273, it was held that where a deceased member had made no designation as to where the benefit coming to him should go, it belonged to his widow, and that if she were not there to take it, it would revert to the association. In Worley v. Northwestern Masonic Aid Association, 3 McCrary, 53, the deceased's certificate stated that the amount of should be paid to his "devisees." He left no will, and the administrator claimed the amount, but without success. These decisions show that the beneficiary certificates of these associations are not insurance policies to this extent at least. An ordinary life insurance policy, on the death of the assured, is a debt payable by the company to his estate, while to suppose these beneficiary certificates to be general assets collectible on failure to designate any beneficiary, by the administrator, is said to be "utterly repugnant to the whole purpose, scope and design of the association as provided in the very law of its existence." In State v. Georgia Medical Society, 38 Ga. 608, a physician had been expelled from a medical society on the ground that he was no longer, as the rules required, "a gentleman of respectable social position," because he had gone on the bail and official bonds of some negroes. He was reinstated by the court. This is a case for the author of John Eax.

The book is very handsomely printed on good paper with clear type, and is well indexed.

J. D. L.

BROWNE ON DOMESTIC RELATIONS. Elements of the Law of Domestic Relations and of Employer and Employed. By Irving Browne. Boston, 1883: Soule and Bugbee.

This is an admirable little volume intended as a sort of primer of the legal principles of Domestic Relations, and also to serve as a manual for those who have passed their novitiate and are called upon suddenly to refresh or confirm their memories. It is carefully and accurately written in Mr. Browne's singularly easy, readable style. The mechanical execution is excellent.

TWENTY-NINTH KANSAS. Reports of Cases Argued and Determined in the Supreme Court of the State of Kansas. A. M. F. Randolph, Reporter. Vol. 29. Topeka, Kansas, 1883: Kansas Publishing House.

This volume contains 140 cases in which opinions were written by the judges as follows: HORTON, C. J., 36; VALENTINE, J., 50; BREWER, J., 41. In thirteen cases *Per curiam* opinions only were filed. Mr. Justice Valentine filed separate opinions in two cases—concurring specially in each case. Mr. Justice Brewer filed separate opinions in five cases—concurring specially in four and dissenting in one. This speaks well for the harmony as well as the industry of the court.

POMEROY'S EQUITY JURISPRUDENCE. A Treatise on Equity Jurisprudence as Administered in the United States of America; Adapted for all the States and to the Union of Legal and Equitable Remedies under the Reformed Procedure. By John Norton Pomeroy. In three volumes. Vol. III. San Francisco, 1883: A. L. Bancroft & Co.

We have heretofore described the plan and scope of this work, and spoken of the author's peculiar views upon the subject of the development of equity jurisprudence as a system, and the effect upon it, of the fusion of equitable and legal procedure, in notices of the two former volumes, 13 Cent. L. J. 99; 15 Cent. L. J. 60. It only remains to say that Mr. Pomeroy has very happily completed his great undertaking, and that the third volume, devoted chiefly to equitable remedies, is a worthy fellow to its predecessors.

NOTES

——Solicitor, sharply—"What did the prisoner do next?" Witness, hesitatingly—"I think ——" Solicitor—"Stop there; you are not to say what you think." Witness—"That's lucky for you; you might hear something you wouldn't consider flattering."—*Irish Law Times.*

——Mr. Henry Fielding Dickens, barrister, has been appointed Recorder of the Borough of Deal, in succession to Mr. Robert John Biron, Q. C., who has been appointed a metropolitan police magistrate for the metropolis. Mr. Dickens is the son of the late Mr. Charles Dickens. He was formerly scholar of Trinity Hall, Cambridge, where he graduated as a wrangler in 1872. He was called to the bar at the Inner Temple in Hilary Term, 1873, and he practices on the South-eastern Circuit, and at the Kent Sessions—*Solicitors' Journal.*